REFORM IN CRIMINAL PROCEDURE

By William E. Mikell,
Professor of Law, University of Pennsylvania.

Criminal procedure is the method fixed by law for the apprehension and prosecution of a person who is supposed to have committed a crime, and for his punishment if convicted.

The perfect code of criminal procedure would be one so framed that under it all guilty persons would inevitably be convicted, and all innocent persons accused of crime would be acquitted.

But since a perfect code is impossible, the best that can be done is to make a code that will serve to convict the maximum number of guilty persons and at the same time allow the minimum number of convictions of persons who are innocent.

It would not be difficult to frame a code that would convict every person guilty of an offense, the changing of a single presumption—that everyone is presumed to be innocent until his guilt is proved beyond a reasonable doubt—would serve to increase immensely the number of persons who would be convicted. Such a code, however, would result also in the conviction of many innocent persons. A code that would bring about this result would be intolerable. It has often been said that "it is better that ten guilty persons should escape than that one innocent person should be convicted." Perhaps the proportion might even be increased with truth. It may be doubted if any code would be tolerated under which it would be possible that for every ten guilty persons who escaped punishment one innocent person would be convicted.

It is commonly believed that criminal procedure is static, and that we are today practicing under the rules formulated several hundred years ago. Nothing could be further from the truth. It is a far cry to the time when a prisoner was not allowed counsel; when he was not allowed a copy of the indictment; when his witnesses were not allowed to be sworn; when he and his witnesses might be brow-beaten by the judge with impunity; when he had no right of appeal from an unjust conviction; when the jury were coerced into a conviction by amercement. Indeed a study of our jurisprudence

will show that the changes that have taken place in criminal procedure are greater in number and more far reaching in importance than in civil procedure. Nor is it true, as is sometimes asserted, that the changes that have taken place have all been in favor of the prisoner. Many of the rules that one hundred years ago shielded the person accused—rules that were themselves the outgrowth of the harshness of earlier rules—are today obsolete as a result either of statute law or of judicial decision. It is a rare thing now to find an indictment quashed because of the misspelling of a word, or the use of an abbreviation; acquittals because of slight variance between the indictment and the proof are much less frequent now than formerly; indictments at least for some crimes, are much less cumbersome, than was required fifty years ago. The doctrine of the waiver of rights formerly regarded as inalienable, has been much and beneficially extended; the plea of former jeopardy has suffered a wise curtailment, and many other changes adverse to the accused have been and continue to be made. Nevertheless much remains to be done in the United States in the way of reform. There can be no doubt that there is a widespread popular belief that the courts are not as effective as they might be in the administration of the criminal law and that the public suffers therefrom. This being so it is not surprising that popular writers and speakers should seek to fasten the liability therefor, nor perhaps that they should fasten it on the judges, who render the decisions complained of. There is a plentiful lack of knowledge in the country as to the function and powers of the judicial office. It is true that some of the decisions which are held up to the ridicule of the public could have been avoided, and a different decision justified under existing law, but a decision criticised can rarely be shown not to have been justified under existing law. Moreover there can be no doubt that the judges have much oftener stretched existing law to the verge of breaking their oath to punish criminals, than to protect them. What is really needed for the proper administration of criminal law is not reform of the judges, but reform of the law they are sworn to administer.

With forty-nine jurisdictions, including the federal government, each with its own code of criminal procedure we find, as might be expected, much lack of uniformity, with corresponding degrees of efficiency in the administration of the criminal law in the different states. No state, however, has, as yet, undertaken to draft a com-

plete code of criminal procedure. The so-called codes of procedure that have been enacted cover only a small part of the whole field, so that the judges are driven, in deciding most of the questions that arise, back to the precedents of the common law with all its technicalities born of a time when the judges, averse to inflicting the harsh punishments the law annexed to crimes, were inventing technicalities as a means of softening the rigors of the criminal code. Not only have our legislators not enacted complete codes, but such parts of codes as they have given us are in most cases unscientifically drawn. Most of our codes are mere patchwork consisting of sections enacted from time to time to meet some particular conspicuous failure of justice, such sections not infrequently having no reference to and often conflicting with other portions of the same code. What is needed is a scientifically drawn code covering the whole field of criminal procedure, *i.e.*, criminal pleading and practice, and procedure proper. Such a code should begin with the arrest of the suspected person and cover every step in the subsequent procedure necessary for his prosecution to the final determination of the cause. A much less comprehensive work than this, however, would purge our criminal jurisprudence of most of the grave micarriages of justice that are now justly charged against it. The decisions that of recent years have been the most fruitful of criticism are due to the rules of law governing the indictment. The indictment might be called the palladium of liberty of the criminal. It is certainly the fetich of criminal procedure. If the existing rules of law governing indictments could be recast much would be gained for the cause of justice.

Much ridicule is directed, and with justice, to the senseless verbosity of the indictment, the useless repetitions of words and phrases, the circumlocutions, and technicalities inherited from an age when these things were accounted for righteousness. Undoubtedly much would be gained from a mere cutting away of these excrescences, for the very multiplication of words held necessary to the validity of an indictment adds to the chances of mistakes and omissions which will render the indictment invalid. But more than this is needed even in relation to the law governing the indictment. An indictment is a written accusation of crime made by a grand jury. In theory it is supposed to be prepared by laymen, since lawyers are not summoned as jurymen, and yet no layman that ever lived, and few lawyers not specially trained, could frame an indictment for the majority

of crimes that are tried in our courts every day; and the law reports are full of decisions overthrowing indictments prepared by legal experts, because some of the legal jargon that a technical age required is omitted, or badly stated, or because in the attempt to incorporate all that is necessary, too much has been written in. The courts have said than an indictment to be valid must (1) charge an offense, (2) must state the circumstances in such a manner as (a) to apprise the accused of the cause and nature of the accusation against him, (b) to enable the accused to prepare his defense, and (c) to enable the accused to plead the indictment in bar of a second accusation for the same offense. This seems a reasonable requirement until we discover that to charge an offense does not mean charge it in ordinary language so that the accused may know exactly of what crime he is accused, but in the technical sense; setting out all the so-called "elements of the crime."

An indictment may perfectly apprise the accused of the offense for which he is to be tried, and yet be held invalid because some technical word is omitted which is said to be necessary to describe an "essential element" of the offense. Thus no matter how clearly an indictment apprised the accused that he is to be put on trial for murder, arson, robbery, rape, and a score of other crimes, if the act charged is not stated to have been done "feloniously" no conviction can be had. The word "murdered" is necessary in an indictment for murder, "took" in an indictment for larceny, and "burned" in an indictment for arson, no matter how clearly the words used show what offense the accused is indicted for. And not only must the correct technical word be used but it must be used strictly grammatically. Thus where a man was indicted for that he "did knowingly sell a certain piece of diseased meat" and was convicted, the Massachusetts court reversed the conviction on the ground that the crime was selling diseased meat, knowing that it was diseased; that knowledge that the meat was diseased was an essential element of the offense and must be alleged, and that the allegation of knowledge in this indictment applied to the sale—"he knowingly sold"—not to the fact that the meat was diseased. In a recent case in Mississippi an indictment for burglary charged that the accused "the storehouse of one X then and there unlawfully and feloniously break and enter." After a trial and conviction the supreme court reversed the conviction because the word "did" was omitted before the word

"unlawfully." Under the same rule an indictment charging a man with adultery or fornication must specifically allege that the woman mentioned was not the wife of the accused; if it does not it is void even though her name clearly shows that she is not his wife. Thus in a Massachusetts case, an indictment charged that Peter Moore did commit the crime of adultery with one Mary Stuart—she the said Mary Stuart then and there being a married woman, and having a husband alive. After conviction the judgment was reversed. The court said, "We suppose it pretty clear to common apprehension, what the grand jury meant by this averment, but the difficulty is that the precision and certainty required in criminal pleading for the security of the accused will not admit any thing to be taken by intendment. An averment that one had committed the crime of adultery, without alleging how and in what manner would be clearly insufficient. The purpose of an indictment is to allege and set forth those facts which constitute that crime; and, for that purpose it must appear that the woman, with whom the illicit connection is alleged to have taken place, was not the wife of the accused." Therefore, though the name of the woman was stated to be Mary Stuart and that of the accused to be Peter Moore, it was held that no crime was charged because Peter Moore and Mary Stuart might conceivably have been husband and wife, and the grand jury may have indicted a man for adultery with his own wife.

Another rule applicable to indictments that causes unnecessary trouble is the fault in pleading known as repugnancy. This fault consists in alleging two repugnant allegations in the indictment and is fatal. An illustration of this occurs in a recent case in Texas. In this case the indictment was for larceny. All the elements of the offense were charged correctly except that it was alleged that the accused took "twenty ten-dollar bank bills, each of the value of twenty dollars." It was entirely immaterial to the constitution of the crime whether the bank bills were ten-dollar bills or twenty-dollar bills, but the allegations being repugnant the court felt obliged to reverse the conviction.

A rule of pleading known as "duplicity" is another fruitful cause of miscarriage of justice in that it requires judges to hold indictments invalid where this fault occurs. In a recent case in Nebraska one was indicted that he did "unlawfully, sell, give away *and* vend spirituous liquors." It was a crime either to sell, or give away

such liquors, and the accused was duly convicted. The supreme court, however, reversed the conviction—properly under the existing rules of law—on the ground that the indictment containing as it did only one "count", charged two offenses, and was therefore uncertain. On the same principle in a recent case in England an indictment was quashed which charged a person with driving a motor "at a rate of speed *or* in a manner dangerous to the public."

The rules of criminal procedure that bring about the unfortunate results such as those above mentioned as well as numerous others that limitations of space make it impossible to treat of, were framed at a time when other existing rules placed the accused at such a disadvantage that they were necessary for the protection of innocent persons unjustly accused, and thus they kept the balance even. They have remained in force though the necessity for them no longer exists, and persons admittedly guilty escape through their operation. They could be abrogated by statute without sacrificing the amount of protection that a wise code should afford to the innocent person unjustly accused of crime.

What legislation there is, and it is not negligible in the United States, is all in the direction of reform. But no state has progressed as far in this direction as Canada and New Zealand. The codes of these countries offer a useful object lesson to us. The American Institute of Criminal Law and Criminology is doing valuable work in an effort for reform; and the legislative research fund is preparing a code of criminal procedure which it will offer for adoption by any state that desires to recast its code.